

**IN THE COURT OF
CRIMINAL APPEALS**

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**VICTOR ORTIZ GONZALEZ, §
Appellant §**

VS. §

NO. PD-0572-19

**THE STATE OF TEXAS, §
Appellee §**

REPLY BRIEF

**APPEALED FROM CAUSE NO. 1497894R IN THE 432ND JUDICIAL
DISTRICT COURT OF TARRANT COUNTY, TEXAS**

ORAL ARGUMENT IS NOT REQUESTED

**Robert K. Gill
ATTORNEY FOR APPELLANT
201 Main Street, STE. 801
FORT WORTH, TEXAS 76102
(817) 803-6918
(817) 338-0700 FAX
STATE OF TEXAS BAR CARD
NUMBER 07921600
*BOB@GILLBRISSETTE.COM***

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

An indictment was returned accusing Appellant of (in three counts) intentionally or knowingly causing bodily injury to three different public servants and evading arrest in a vehicle in a fourth count. CR 5-6. All four counts contained deadly weapon allegations. CR 5-6. At trial, the State proceeded only on the first count (assault on Officer Rogers) and the evading arrest count. RR III – 8-9 (reading of indictment). Appellant pled not guilty. RR III – 9.

The charge to the jury, in addition to the allegations of intentionally and knowingly, allowed the jury to find Appellant guilty of assault if they believed that he was reckless. CR 55. The jury did find him guilty, both of assault on a public servant and evading arrest. CR 61, 62. In addition, the jury made a deadly weapon finding as to both counts. CR 61, 64.

At punishment, Appellant pled “true” to being a repeat offender. RR VI - 7. The jury assessed a punishment of forty-five years for assault of a public servant, twenty years for evading arrest, and fines of \$10,000 for each. RR VII – 5-6. The trial court sentenced him to these terms concurrently. RR VII – 6-7.

On appeal, Appellant complained that the evidence was insufficient to find him guilty of intentionally or knowingly committing aggravated assault, and that it was error for the trial court to have instructed the jury that it could find Appellant guilty if it found that he “recklessly” committed aggravated assault. A panel of the Fort Worth Court of Appeals agreed with Appellant’s jury charge complaint, found the error to be egregiously harmful, and reversed and remanded the case. *Gonzalez v. State*, No. 02-18-00179-CR, 2019 WL 2042573 (Tex. App.—Fort Worth May 9, 2019, pet. granted) (unpublished). The State filed a petition for review in this Court which was granted on August 21, 2019. The State filed its brief on the merits on September 19, 2019. This Court granted Appellant’s motion to extend the time to file his reply brief to November 5, 2019.

STATEMENT OF FACTS

Fort Worth police officer Taylor Rogers was patrolling the west side of town with his partner Craig Chambers on April 24, 2017. RR III – 17-18. Chambers was driving. RR III - 67. They got a call to assist in a “bait vehicle” tracking situation. RR

III – 19. As the property in the car at issue had a tracking device, detectives were directing the officers where they should go. RR III – 20. Using this information, they were able to locate the suspect vehicle. RR III – 21. It was a yellow Hummer. RR III – 21.

The officers got behind the Hummer and turned on their lights to initiate a traffic stop – the Hummer had run a stop sign. RR III – 22. The Hummer, instead of stopping, went through the gate of an apartment complex and accelerated. RR III – 24. Officer Rogers surmised by this time that the driver was trying to get away from the officers. RR III – 24. The Hummer drove to another gate in the complex, but this gate was locked. RR III – 25. It came to a stop. RR III – 25.

Officer Chambers drove his patrol car to the left of the Hummer, stopping the front of his car even with the Hummer driver’s side door in an attempt to keep the driver from exiting. RR III – 26, 70. The cars were very close to each other. RR III – 26. However, as the patrol car was parked at an angle, there was enough of a gap for Officer Rogers to open his door and try to get out. RR III – 27.

Rogers only got his right leg out of the patrol car and onto the ground. RR III – 28. Then, the driver of the Hummer reversed, pinning Rogers between his door and pillar dividing the front and back of the patrol car. RR III – 28-29. Rogers responded by yelling, “Whoa.” RR III – 30. The Hummer driver looked in the rearview mirror,

accelerated, and reversed away from the patrol car. RR III – 30. Chambers also put his car into reverse to follow the Hummer, running into it in the process. RR III – 31. Because the patrol car became disabled, the officers gave chase on foot. RR III – 32. The Hummer got away, however. RR III – 32. As a result of the pinning, Officer Rogers felt pain in his leg. RR III – 36.

After he was arrested, Appellant admitted being the driver of the Hummer and admitted to being part of the police chase. RR IV – 88. However, Appellant was surprised when Dominguez told him that an officer had been hurt as a result of the chase. State’s ex. 31 (audio recording at 18:00 – 22:00).

SUMMARY OF THE ARGUMENT

The jury instructions in Appellant’s case allowed him to be convicted under a theory not alleged in the indictment. This was error. The Fort Worth Court found that Appellant was egregiously harmed by the error.

That holding was correct. First, this case is controlled by logical authority from this Court. Second, the State’s reliance on an unrequested, hypothetical lesser included offense instruction is without precedence – a harm analysis should be based on what *actually* occurred at trial, not on what didn’t. Third, Appellant suffered egregious harm precisely *because* the jury could have convicted him based on the unindicted mental element. Fourth, the State’s plea to rely on the non-included lesser offense fails

because there were no reckless acts or circumstances pled in the indictment.

ARGUMENT AND AUTHORITIES

Appellant's disagreement with the State is fundamental: whereas the State argues that the trial court's charging error was "a matter of form rather than substance," Appellant asserts that the error allowed his conviction under a theory that was not alleged in the indictment. Contrary to the State's argument, Texas defendants are still protected against this eventuality.

The State's harm analysis is based on the faulty premise that Appellant *could have* been convicted of reckless assault through the mechanism of a lesser included offense instruction. As Appellant will show, such an argument is irrelevant – there was no lesser included offense instruction, and the State did not even request one. In fact, the lesser included offense argument stands in absolute contradiction to authority from this Court.

In addition, contrary to the State's argument, recklessness was never contemplated as nothing in the indictment alleged the circumstances of the acts which constituted recklessness.

A. Reed dictates the result in this case

Appellant was charged by indictment with intentionally or knowingly causing bodily injury to a public servant. CR 5. *See* TEX. PENAL CODE § 22.02(b)(2)(B)

(aggravated assault on public servant). The court’s charge to the jury, however, allowed for a conviction if (in addition to the mental states of intentionally and knowingly) Appellant *recklessly* caused bodily injury to Officer Rogers. CR 52 (“A person commits an offense if the person intentionally, knowingly or recklessly causes bodily injury to another....”); CR 55 (application paragraph: asking jury to determine whether Appellant “did then and there intentionally, knowingly or recklessly cause bodily injury to T. Rogers, a public servant”).

A defendant may only be tried on the offenses alleged in the charging instrument. *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994). The jury charge may not enlarge the offense alleged and authorize the jury to convict a defendant on a basis or theory not alleged in the indictment. *See Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003).

Reed v. State, indeed, compels the decision made by the Fort Worth Court. In *Reed*, the defendant was charged with intentionally or knowingly causing bodily injury to the victim while using a firearm. *Reed*, 117 S.W.3d at 261. The jury instructions, however, allowed the jury to convict the defendant if it found that he *recklessly* caused bodily injury. *Id.* This Court held that the inclusion of a lower culpable mental state in the jury instructions than that alleged in the indictment could lead to the possibility that the defendant was improperly convicted of an offense allowed under the statute,

but not alleged. *Id.* at 263. This Court further dismissed the State’s argument that such a conviction was merely an accepted conviction of a lesser included offense:

However, because neither party requested a lesser included offense jury instruction and the lesser included offense issue was not raised at trial, we will not decide this case based on an issue that was not presented to the trial court or preserved for appeal. The failure to request a lesser included offense instruction in the jury charge precludes the State’s use of [the lesser included offense statutes] to now bring in the culpable mental state of recklessness that was not alleged in the indictment. Thus, a conviction for a lesser included offense requires not only a lesser included offense instruction to the jury, but also an acquittal for the charged offense, neither of which are present in this case.

Id. at 264-65.

The State now argues that the trial court *could have* instructed the jury that it could convict Appellant of the lesser included offense of reckless assault, and that such a hypothetical instruction renders the error harmless. State’s brief at 12. First, a harm analysis should be based on fact, not a counterfactual after-the-fact supposition. It would be unprecedented for any reviewing court to find harmlessness on the basis of something that did not occur – as opposed to what actually happened at trial.

Second, in order to give the State what it wants, this Court would have to overrule *Reed*. The State has not asked for such a thing – indeed, it glosses over the holding in *Reed* by ignoring the fundamental nature of the charging error. At any rate, it would be a mistake to overrule *Reed* or, to repeat the State’s mistake, simply ignore it

B. The State's analysis ignores the charging error

The State appears to misunderstand the very nature of the error¹ it argues is harmless. In its brief, the State ignores the charging error and simply concentrates on the unrequested lesser included instruction on reckless assault. State's brief at 11-12. The State reasons that Appellant suffered mere "theoretical harm" because the trial court "could have" included that lesser in the jury instructions. State's brief at 13-14. In the State's understanding, the only "error" seems to be the failure of the trial court to include reckless assault in the charge.

But that isn't what happened to Appellant. In reality, he "was convicted of an offense that is allowed under the statute but was not alleged in the indictment." *Reed*, 117 S.W.3d at 263. The point is that the jury was allowed to find that he acted recklessly, when in reality the jury should have been confined to deciding whether Appellant acted intentionally or knowingly. *See Reed*, 117 S.W.3d at 264 ("Thus, while the jury instructions authorized conviction of an offense that is allowed under the statute [reckless aggravated assault], it was not an offense for which appellant was indicted [intentional or knowing aggravated assault]."); *Brown v. State*, 595 S.W.2d

¹ "Though not mentioned in *Almanza*, the nature of the error and its potential for harm are important threshold considerations that ought to guide the harm analysis." *Ramos v. State*, 991 S.W.2d 430, 434 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd).

550, 552 (Tex. Crim. App. 1980) (“Thus, the jury was authorized by the charge to convict the appellant under a theory of robbery which was not alleged in the indictment.”).

Accordingly, Appellant suffered harm because there was *some evidence* from which a jury could have found recklessness – the unindicted offense. The Dallas Court of Appeals understood this in deciding the harm question² upon the remand of *Reed*: “Given the evidence and the jury instruction, it is possible the jury found [Reed] guilty of recklessly causing bodily injury to [the victim].” *Reed v. State*, 05-00-00472-CR, 2004 WL 225547 at *1 (Tex. App.—Dallas Feb. 6, 2004, no pet.) (unpublished). *See also Gonzalez*, 2019 WL 2042573 at *6 (“Although the evidence supported Appellant's conviction under the charged mental states of intentionally or knowingly, the charge itself and the tenor of the trial lowered the State's burden to prove Appellant guilty beyond a reasonable doubt of the indicted offense.”).

The State gets it backward. It now argues that *because* the evidence shows he was reckless (and recklessness could have been charged as a lesser), everything is okay. It isn't. The State's analysis is nothing less than an open invitation to gamesmanship, encouraging a prosecutor to concentrate his case on an unindicted offense, failing to

² Reed objected to the inclusion of “recklessness” in his charge. Thus, the Dallas court only had to find “some harm.” Appellant, however, cannot discern any daylight between “egregious” and “some” harm with regard to the fundamental error in this case – that the jury was allowed to consider an offense Appellant wasn't charged with and could have reasonably found evidence in the case establishing guilt for that unindicted offense.

ask for a lesser in the charge, then claiming the whole exercise was harmless to the defendant. This is precisely what occurred in Appellant’s case. The prosecutor explained during jury selection that it could prove Appellant acted intentionally, knowingly, or recklessly – but that it did not have to prove all three.³ RR II – 45. The State also concentrated a large part of its jury argument to recklessness.⁴ RR V – 7-8.

The State’s proposed “lesser included offense-based” harm analysis ignores the nature of the charge error in Appellant’s case and actually compounds the error’s harm in the first place. This Court should overrule the State’s arguments and reaffirm the logical force of *Reed*.

C. Alleging acts of recklessness

The State says⁵ that notice in this case wasn’t a problem – that the indictment adequately pled the circumstances indicating Appellant’s alleged recklessness. Appellant disagrees.

The Code of Criminal Procedure requires, when recklessness is part of an offense, the indictment “must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness.” TEX. CODE CRIM. PRO. ART. 21.15. This Court has

³ See *Limon v. State*, No. 03–10–00666–CR, 2012 WL 5392160 at *4 (Tex. App.—Austin Nov. 2, 2012, no pet.) (unpublished) (discussion about unindicted mental element during voir dire weighs in favor of finding egregious harm).

⁴ See *Brown v. State*, No. 04–03–00009–CR, 2004 WL 383342 at *5-6 (Tex. App.—San Antonio March 3, 2004) (unpublished) (prosecutor’s focus on recklessness during closing weighs in favor of finding egregious harm), *pet. dismiss’d, improv. granted*, 2005 WL 1398609 (Tex. Crim. App. June 15, 2005).

interpreted this language to mean that the State must allege “the circumstances of the act which indicate that the defendant acted in a reckless manner.” *Gengnagel v. State*, 748 S.W.2d 227, 229 (Tex. Crim. App. 1988).

This Court’s opinion in *Reed*, *supra*, underscores the importance of the recklessness allegation:

This Court’s opinion in *Reed*, *supra*, underscores the importance of the recklessness allegation:

Article 21.15 does not keep the parties from submitting a lesser included offense with a reckless culpable mental state to the jury. However, when recklessness is left out of the indictment for the charged offense, and no lesser included offense is submitted to the jury (as in this case and in *Wilson*) then Article 21.15 precludes the inclusion of recklessness or criminal negligence in the jury instructions for the charged offense.

Reed, 117 S.W.3d at 265.

The accusation against Appellant contained the following language:

[Appellant] did then or there intentionally or knowingly cause bodily injury to T. Rogers, a public servant, to-wit: an employee or officer of government, namely a police officer for the City of Fort Worth, by striking T. Rogers’ patrol car with the Defendant’s car pinning T. Rogers between the two cars while T. Rogers was lawfully discharging an official duty and the defendant knew that T. Rogers was a public servant. . . .

CR 5.

⁵ There is no “argument” as such. Relegated to a footnote, the State simply states as a conclusion that “the appellant was provided fair notice because his indictment alleges the specific acts relied upon to constitute his reckless conduct.” State’s brief at 14 n.5

All this does is state the physical acts that Appellant is accused of committing. This isn't enough. The acts of recklessness required to be pled "are really those 'circumstances' surrounding the criminal act from which the trier of fact may infer that the accused acted with the required recklessness." *State v. Rodriguez*, 339 S.W.3d 680, 683 (Tex. Crim. App. 2011). *See id.* at 682 ("The issue in this case is not 'how' did the defendant discharge a firearm (by pulling the trigger), but how did he act 'recklessly' in discharging the firearm.").

Examples of adequately pled recklessness would include "recklessly cause serious bodily injury to another, (complainant) by jumping over the second floor railing to the ground floor of a mall during business hours" (in a robbery recklessly causing bodily injury case)⁶, and that a defendant did "recklessly cause the death of [complainant] by operating his motor vehicle, a deadly weapon, at an unreasonable speed, by failing to maintain a proper lookout for traffic and road conditions, by failing to maintain a single lane of traffic, and by changing lanes in an unsafe manner."⁷ These are circumstances which emphasize the concept that an ordinary person in the defendants' "shoes probably would not have taken the same risk." *Craver*, 2015 WL 3918057 at

*4. By contrast, Appellant was on notice of nothing that would have led one to think that recklessness would be an issue in his case. "Striking" and "pinning" are simply ways to commit intentional assault. *See* CR 5. A reckless state of mind is completely

missing from this indictment.

Therefore, in accordance with *Reed*, the total failure of the State to allege acts of recklessness in Appellant's indictment precludes the State from justifying convicting Appellant of an unalleged offense by relying on a hypothetical lesser included offense possibility.

A. Arteaga v. State has no effect on Appellant's case

In *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012), this Court held that if an appellate court concludes that evidence supporting a conviction is legally insufficient, it may reform the judgment to reflect a conviction for any lesser included offense – even if that lesser was unrequested by either side and did not find its way into the jury instructions. More recently, this Court applied this hypothetical lesser included offense analysis to a case in which there was obvious and egregiously harmful jury charge error. *See Arteaga v. State*, 521 S.W.3d 329, 340 (Tex. Crim. App. 2017).

The issue in *Arteaga* was an erroneous jury charge that had the effect of leading the jury to mistakenly find a fact that raised the punishment level. *See id.* Thus, this Court decided – instead of remanding it – to simply reform *Arteaga*'s conviction from a first-degree offense to a second-degree offense. *See id.* at 341.

⁶ *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057 at *4 (Tex. App.—Fort Worth June 25, 2015, pet. ref'd) (unpublished).

⁷ *Stadt v. State*, 120 S.W.3d 428, 441–42 (Tex. App.—Houston [14th Dist.] 2003), *aff'd*, 182 S.W.3d 360 (Tex. Crim. App. 2005)

Appellant's case is different. The jury charge error in this case is not a simple matter of messing up the punishment range. Here, the error has authorized the jury to convict Appellant on a theory not alleged in the indictment. *See Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003); *see also Brown*, 595 S.W.2d at 552 (error where "jury was authorized by the charge to convict the appellant under a theory of robbery which was not alleged in the indictment"). To simply reform Appellant's judgment so that it reflected a conviction for reckless aggravated assault would be to do nothing more than reinforce the error itself. In other words, *Arteaga* was a case about *remedy*, not *harm*. Therefore, *Arteaga* does not change the analysis in Appellant's case, and *Reed* should still control.

CONCLUSION AND PRAYER

The State asks for a harmlessness finding on the basis of an unasked for, unimagined, and uncharged lesser included offense. The State presents no authority for this argument, and (though the State mentions it) seems to ignore the *holding* in the one case directly on point – *Reed v. State*. Appellant was indicted for one offense while the jury was instructed that it could consider another. Appellant was egregiously harmed by this error.

Appellant prays that this Court reject the State's arguments in its brief on the merits and affirm the judgment of the Fort Worth Court of Appeals.

Respectfully submitted,

ROBERT K. GILL

By: /s/ Robert K. Gill

Robert K. Gill

Attorney for Appellant 201

Main Street, Ste. 801 Fort

Worth, Texas 76102 (817)

803-6918

FAX (817) 338-0700

State of Texas Bar Card

Number 07921600

BOB@GILLBRISSETTE.COM

CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Tex. R. App. P. 9.4(i)(2)(B), the foregoing document contains 3,393 words, including/~~excluding~~ any parts exempted by Tex. R. App. P. 9.4(i)(2)(B). Signed on this the 5th day of November 2019.

/s/Robert K. Gill

Robert K. Gill